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SUPREME COURT, U.S.

No. 79-6370

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

ALBERT ABLE and BETTY ABLE

vs.

STATE OF DELAWARE

On Appeal From The Supreme Court of Delaware

JURISDICTIONAL STATEMENT

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April, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

ALBERT ABLE and BETTY ABLE

vs.

STATE OF DELAWARE

On Appeal From the Supreme Court of Delaware

JURISDICTIONAL STATEMENT

Appellants Albert Able and Betty Able appeal from the judgment of the Supreme Court of Delaware entered January 8, 1980 affirming the permanent termination of their relationship with their four children.

OPINIONS BELOW

The per curiam opinion of the Supreme Court of Delaware, dated January 7, 1980, is attached to this jurisdictional statement as Appendix A. Prior opinions in the same proceeding include an oral opinion of the Superior Court, delivered August 23, 1977, and a final order of judgment of the Superior Court dated May 31, 1978, which are attached, respectively, as Appendices B and C. None of the three opinions is officially reported.

JURISDICTION

The proceedings below were commenced in the Delaware Superior Court pursuant to 13 Del. C. §§1101-13 to terminate Appellants' parental rights in their four minor children. Following the opinion of the Delaware Supreme Court entered on January 8, 1980 (Appendix A), the Clerk of that Court entered a final judgment and mandate on January 29, 1980 (Appendix D).* A notice of appeal in this case was filed in the Delaware Supreme Court on April 3, 1980, and is attached as Appendix E.** Jurisdiction is conferred on this Court by 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and the provisions of 13 Del. Code §§1101-13 are set forth in Appendix F.

QUESTION PRESENTED

Is the Delaware statute, which provides for the permanent termination of the parent-child relationship where the parent is "not fitted," unconstitutionally vague and indefinite in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

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* Under Delaware Supreme Court Rule 19, a final judgment issues 15 days after the entry of an opinion.

** A notice of appeal in identical form, also attached as Appendix E, was filed in the Delaware Superior Court on April 2, 1980, in the event that that Court should now be deemed the Court "possessed of the record." Sup. Ct. R. 10(3).

STATEMENT OF FACTS

Delaware, like many other states, provides a statutory procedure for termination of the parent-child relationship, commonly known as a "TPR" proceeding.* The TPR remedy is different from, and far more drastic than, a custody proceeding that transfers control of the child on a temporary or indefinite basis. The TPR remedy, by contrast, permanently terminates all legal rights of the parent or parents affected. In practical terms, it excludes the parent or parents from any further contact or relationship with the child, regardless of improvement or rehabilitation of the parent. When parental rights are terminated the "child is dead so far as the parent is concerned". In Re William L., 383 A. 2d 1228, 1252 (Pa.) (Manderino J., dissenting) cert. denied 439 U.S. 880 (1978) cf. 13 Del. C. §1112 ["..as if the child and the person or persons whose parental rights have been terminated were and always had been strangers."].

On August 13, 1976, the Division of Social Services of the Delaware Department of Health and Social Services (the "Division") filed a TPR petition in the Delaware Superior Court against ALBERT ABLE and BETTY ABLE, the natural married parents of four children whose ages then ranged from 20 months to seven

---

* "TPR" is an acronym for "termination of parental rights." 13 Del. C. §§1101-13. The entire chapter is reprinted in Appendix F.

years. The statutory "ground" asserted in the TPR petition was that set forth in 13 Del. Code §1103(4), which reads in its entirety:

> "The parent or parents of any such child, or any person or persons or organization holding parental rights over such child are not fitted to continue to exercise parental rights."*

Nothing in the statute provides any further guidance -- by definition, requirement, standards or otherwise -- as to what constitutes unfitness under this provision.

On August 22, 1977, the TPR petition was heard in the Superior Court. The Division, through the testimony of several social workers, spoke of their contacts with the Ables and their children. In response, the Ables presented the testimony of Dr. D__, a psychiatrist who had been counseling the Ables on a weekly basis since May, 1976. Dr. D__ testified that he saw no reason why the Ables could not in the near future provide adequate care for the children and assume parental responsibilities.

---

* The TPR petition served upon the parents pursuant to 13 Del. Code §1107 did not indicate what activities rendered them unfit. Although the Division filed a narrative social report in the Superior Court pursuant to 13 Del. Code §1105(c), such was not served with the petition. In fact, the Division refused to produce the report for the parents' inspection in the absence of a court order.

At the conclusion of the trial the trial judge delivered his oral findings and order.* He found that, as of March, 1976, the Ables were unfit because (1) Fred, then eighteen months, was unable to walk, preferred a bottle, and experienced difficulty speaking, (2) Candy, then six years old, had difficulty sleeping and threw food and (3) Elizabeth was not receptive to communications and control.** A. 2b. However, relying on Dr. D__, "the true professional in the case" (A. 4b), he continued the case for six months and asked Dr. D__ to report in six months concerning "the present condition of the [Ables] in handling their children." A. 4b. Dr. D__ did so, indicating he believed that the parents' progress enabled them to presently care for two of their children.

The Superior Court reconvened the hearing in April, 1978, and heard not only from Dr. D__ but from a psychiatrist produced by the Division. The two psychiatrists offered conflicting views about the parents' abilities. After post-hearing briefing***, the trial judge issued a written opinion. Finding that the parents' "dependency needs" were

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* No finding was made concerning Dorothy.

** The trial judge prefaced his remarks by stating:

> "Gentlemen, it is unfortunate that many times the person who has to decide cases such as this are always influenced by their own personal backgrounds, but that's the case. I guess maybe that's something that's built into justice.
>
> Being an Italian, I'm a firm believer that a strong family can take on the world and survive." A. 2b.

*** In that briefing, the Appellants reiterated their vagueness challenge to 13 Del. C. §1103(4).

"still so great" (A. 1c), he held that it would be in the best interests of the children to sever their relationship with their parents.

On appeal the Delaware Supreme Court, by per curiam opinion, affirmed. Relying on its recent holding in In Re Five Minor Children, 407 A. 2d 198 (1979) [prob. juris. noted sub nom., Doe v. Delaware, 48 U.S.L.W. 3613 (U.S. March 24, 1980)], the Court rejected the Appellants' vagueness attack on 13 Del. Code §1103(4). A. 3a.

THE QUESTION, POSING A CHALLENGE IDENTICAL TO THAT IN DOE V. DELAWARE, NO. 79-5932 PROBABLE JURISDICTION NOTED, 48 U.S.L.W. 3613 (U.S. MARCH 24, 1980), IS SUBSTANTIAL

THE DELAWARE TPR STATUTE IS UNCONSTITUTIONALLY VAGUE AND INDEFINITE.

Rejecting the Appellants' challenge, the Delaware Supreme Court sustained the "fitness" provision of 13 Del. Code §1103(4) against charges of unconstitutional vagueness. Whether that statute satisfies due process requirements is a substantial constitutional question involving rights and relationships of the most fundamental nature. Indeed, in Doe v. Delaware, No. 79-5932., prob. juris. noted, 48 U.S.L.W. 3613 (U.S. March 24, 1980), this Court has agreed to review an identical challenge to this statute. Doe, Jurisdictional Statement at 2, 10.

It is well established that parents' relationship with their children is one of the liberties to which due process must be accorded. Quilloin v. Walcott, 434 U.S. 246, 255 (1978). Indeed, this Court repeatedly has struck down state attempts to violate the integrity of the family. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Moore v. East Cleveland, 431 U.S. 494 (1977); Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). See also Duchesne v. Sugarman, 566 F. 2d 817 (2nd Cir. 1977). When the state seeks to regulate or curtail the parent-child relationship, it must do so under a standard evidencing "a greater degree of specificity

than in other contexts." Smith v. Goguen, 415 U.S. 566, 573 (1974).*

Delaware provision 13 Del. C. §1103(4) lacks that required degree of specificity. The statute, by providing no guidance as to what constitutes unfitness, forces courts, state officials and parents to guess at its meaning and breadth. It leaves the fact finder to determine from his own subjective values whether the parents have committed any misconduct. But cf. Giacco v. Pennsylvania, 382 U.S. 399 (1966).

TPR statutes employing essentially similar language have been held invalid by two federal courts. Thus, in Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976), the offending language authorized termination of parental rights of those whose homes were "unfit" and "improper." Recognizing the circular and opaque character of the statutory standard, the court held Alabama's TPR statute unconstitutionally vague. Similarly, the Iowa TPR statute, focusing on the terms "unfit" and "necessary parental care and protection," was invalidated in Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd on other grounds, 545 F. 2d 1137 (8th Cir. 1976) (per curiam).**

---

* This Court has held that vagueness is not permissible solely because a statute was enacted for the protection of children. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 689 (1968).

** In Alsager, the Court of Appeals admonished:

> "Both the vagueness and overbreadth attacks upon these provisions are serious ones. By declining to affirm on these grounds, however, we afford the Iowa courts an additional opportunity to give the statutory provisions a plainly desirable limiting construction." 545 F. 2d at 1138.

In addition to these federal court decisions, at least one state supreme court has invalidated language virtually identical to that upheld below. Davis v. Smith, 583 S.W. 2d 37 (Ark. 1979) ("parents . . . unable to provide a proper home").*

The findings made in relation to 13 Del. C. §1103(4) in this case illustrate the vices of vague statutes. Whether Appellants are "not fitted" so as to forfeit permanently their relationship with their children because their eighteen month old baby cannot walk or prefers a bottle or because their seven year old child throws food (A. 2b) are issues over which men of ordinary intelligence can argue interminably. Moreover, reasonable men would not unanimously conclude that Appellants' "dependency" on others allows the state to intervene into their family. Indeed, in the trial judge's first opinion he realized that in making the "unfitness" determination he had to rely upon his own background and a subjective opinion. A. 2b.**

---

* The statutory language of TPR statutes has not escaped scholarly criticism. See e.g., Note, The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings, 68 Geo. L. J. 213 (1980); Due Process and the Fundamental Right to Family Integrity: A Re-evaluation of South Dakota's Parental Termination Statute, 24 So. Dak. L. R. 447 (1979); Day, Termination of Parental Rights Statutes and the Void for Vagueness Doctrine: A Successful Attack on the Parens Patriae Rationale, 16 J. Fam. L. 213 (1977-78).

** The effects of such indeterminate statutory grounds are greatly accentuated when the state's burden is merely to pursuade the fact finder of his subjective wisdom by a preponderance of the evidence. See In Re Five Minor Children, supra.

The Delaware statute's extraordinary vagueness, the precious quality of the family relationships terminated by the statutory remedy, and the underlying conflict on this precise issue between Delaware and the Federal courts all demonstrate that this appeal presents a substantial question warranting plenary review.

Since their vagueness challenge is presently pending before this Court in Doe v. Delaware, supra, Appellants request that the Court grant review in their appeal and defer disposition until a decision on the constitutionality of 13 Del. C. §1103(4) is rendered in Doe. A decision in Doe concerning the Delaware TPR statute will be dispositive of the issue here presented.

CONCLUSION

For the reasons stated, and because the Court noted probable jurisdiction in Doe v. Delaware, supra, an appeal which involves the identical question, the Court should note probable jurisdiction.

Respectfully Submitted:

Gary A Myers

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April 3, 1980

79-6370

No.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

ALBERT ABLE and BETTY ABLE

vs.

STATE OF DELAWARE

On Appeal From The Supreme Court of Delaware

APPENDIX

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April, 1980

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* Throughout this Appendix and the jurisdictional statement, the real names of the parents have been changed to Albert Able and Betty Able and the names of their children have been altered in order to maintain confidentiality. A separate set of all papers reprinted in this Appendix with the original names of the parents and children left unchanged has been filed with the Clerk of this Court, with the request that confidentiality be maintained. Under Delaware law, the proceedings are confidential. 13 Del. Code §§1107(e), 1111.

APPENDIX A

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF	§	
	§	
FOUR MINOR CHILDREN	§	
	§	
	§	No. 205, 1978
	§	
	§	
	§	
	§	

Submitted: October 9, 1979
Decided: January 7, 1980

Before HERRMANN, Chief Justice, McNEILLY and HORSEY, Justices.

Upon appeal from Superior Court. Affirmed.

Frederick S. Kessler of Community Legal Aid Society, Inc., Wilmington, for appellants.

Thomas LaPenta, Deputy Attorney General, Wilmington, for appellee.

PER CURIAM:

JAN - 8 1980

It appears to the Court from the briefs and arguments of the parties and the record of this appeal that:

(1) This is an appeal from a Superior Court order terminating parental rights to four minor children for parental unfitness under 13 Del. C. §1103(4).

(2) The respondent parents raise three issues on appeal, first, that 13 Del. C. §1103(4) is unconstitutionally vague in permitting parental rights to be terminated if parents are found to be "not fitted to continue to exercise parental rights;" second, abuse of discretion in terminating parental rights without a finding of present unfitness and when there was a possibility that respondents might become fit some years hence; and third, abuse of discretion in the Trial Judge's denial of respondents' motion to alter or amend the judgment without reasons given.

(3) Following an initial evidentiary hearing on the issue of fitness, the Trial Court found that the parents were then unfit but granted a six months' continuance to determine what, if any, benefit would result from further psychiatric counseling of the parents. Following a second evidentiary hearing some nine months later and the receipt of further psychiatric testimony, the Court found that the parents were "still not ready to assume the role of parents" and hence unfit and further determined that the children were in such great need of parental care that parental rights should be then terminated.

(4) The constitutionality of 13 Del. C. §1103(4) was determined by In re Dingee, Del.Supr., 328 A.2d 139 (1974) and recently affirmed in In re Five Minor Children, Del.Supr., 407 A.2d 198 (1979), and In re Three Minor Children, Del.Supr., ____ A.2d _____ (1979). Dingee held that unfitness does not require precise definition to be a constitutionally sound basis for termination of parental rights. In Three Minor Children, we reaffirmed Dingee, stating that the phrase "not fitted" within §1103(4) has been judicially interpreted to mean "unfitted for parental duties;" and that "[n]o inflexible rule can or should be laid down ... but each case must be decided on its own peculiar facts." In re Three Minor Children, supra, quoting Dingee, 329 A.2d at 140 (1974). These decisions are clearly controlling as to the constitutional challenge.

(5) Parents concede that they are presently incapable of carrying out parental roles and unfit even for custody of their children. However, they contend that by reason of the possibility that they may at some future time become fit, attested to by one expert who found that they had made "some progress," their parental rights should not have been then terminated, and that to do so was an abuse of discretion.

(6) Contrary testimony was given by the other expert who was of the opinion that there had been hardly any progress at all made by the parents in two years of psychotherapy and another year of counseling.

(7) It was not an abuse of discretion for the Court to weigh the "present and urgent" need of the children for parental care against the continuing unfitness of their parents and the uncertainty that they would overcome their unfitness.

(8) The Trial Court did not abuse its discretion in its summary denial of respondent's motion "to alter or amend" the judgment which amounted to a motion for reargument as to issues previously decided by the Court. In any event the issues raised therein are encompassed within those decided by this appeal.

(9) The decision of the Court below complied with the dual requirements for termination of parental rights, namely, (1) the existence of facts sufficient to support a finding of lack of parental fitness and (2) determination that termination of parental rights was in the best interest of the children. See Cline v. Hartzler, Del.Supr., 227 A.2d 210 (1967).

* * * * *

Affirmed.

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DIVISION OF SOCIAL SERVICES OF DELAWARE,	Civil Action No. 7165
Plaintiff,	1 9 7 6
vs.	
[ALBERT ABLE] and [BETTY ABLE]	Termination of Parental Right Hearing - August 23, 1977
Defendants.	

BEFORE: HON. VINCENT A. BIFFERATO, J.

APPEARANCES:

DANA S. SHREVE, ESQ.
Deputy Attorney General
for the State of Delaware.

FREDERICK KESSLER, ESQ.
for the Defendants.

TRANSCRIPT OF COURT'S REMARKS

August 23, 1977
Courtoom No. 3
9:30 o'clock a.m.

PRESENT:

As noted.

* * * * * *

THE COURT: Gentlemen, it's unfortunate that many times the person who has to decide cases such as this are always influenced by their own personal backgrounds, but that's the case. I guess maybe that's something that's built into justice.

Being an Italian, I'm a firm believer that a strong family can take on the world and survive.

In this case, the Court has no doubt that as of March of '76 the [ABLES] were unfit. There's no doubt in my mind about that. Looking at the testimony of Mrs. Kade, [FRED] was unable to walk. Eighteen months old, and still took a bottle. Couldn't chew. Had difficulty speaking. Somebody who allows that does not know how to raise children.

[CANDY] had difficulty sleeping. Constantly disposed of -- threw up food. Parties could not communicate or control [ELIZABETH]

Gentlemen, there's no question in my mind in March of '76 the [ABLES] were unfit to have these children. The Department of Social Services did the correct thing in removing them, and on that date the parties were unfit.

The question is, as Mr. Kessler put it, do we give up on the [ABLES] I think we have to balance, at this point, the interests of the [ABLES] and the interest of the four children.

[CANDY]the oldest child, is eight years old. Four children, [FRED] being the youngest, who's two years old. There comes a time when those four children can no longer stand the haphazard activity and home that the [ABLES] gave them.

The Court is also convinced that the [ABLES] relied upon everybody they came in contact with and leaned upon them. And perhaps it was only Doctor [D___]who first said it when he said that when he first met the [ABLES] they were the most manipulative people he ever met. Listening to Mr. Mercer and Mr. Lattomus testify, the Court can well agree with that.

In '75 they were told in September to make an appointment with the Delaware Guidance. They didn't do so until December, and could not get an appointment until February, and then cancelled out because of snow. According to Mr. Mercer, it was only a threat of snow. Doctor [D___] said it was snowed in, the place was closed. The information could have only come from the [ABLES] And the Court is convinced that they are, perhaps, still are a little bit manipulative, but the Court is also aware that Mrs. [ABLE] had had a tubal ligation. I don't accept the fact that it was coerced by DSS, but, again, a little bit of my background indicates that -- Well, personally, I'm opposed to such things.

But, according to Doctor [D___]the true professional we have in this case, as far as a psychiatrist is concerned, that the [ABLES] are coming along. And should we give up on the at this point? I'm inclined not to, but I'm also inclined to set a limit, because I feel the ages of the children indicate that they need a good home. They're probably in a unique situation in that if the [ABLES] were just a little better, we could have never been here and the children would never have had much of an opportunity. But since we are at this point, we can either say to the[ABLES] improve and you'll get the children back or they'll be put in a better home. So perhaps they have the better of two worlds. But the Court believes that the [ABLES] deserve a second opportunity, but the Court does not believe that the [ABLES] deserve the children at this time. The court is going to continue this case for six months.

I sort of hate to do what Family Court does, because it doesn't resolve anything, but to give everybody an opportunity, the Court's going to take that route. I'm going to continue the case for six months. I'm going to ask Doctor[D___] if he continue to treat these people, that he send me a report in six months evaluating the present condition of the [ABLES] in handling their children. I will also ask the Department of Social Services to keep close contact with the [ABLES] and with Doctor [D___]

Perhaps Doctor [D___]can give the [ABLES] case-worker some insight into dealing with the [ABLES] in the hope that the children can be placed back with the [ABLES] But if it cannot be accomplished within six months, and I hate to set deadlines, but the children have to have some stability, if it can't be accomplished in six months, the Court's going to terminate the parental rights so the children can go out and have a better home life than the [ABLES] could provide them at the present time. And that's the best I can do under the circumstances.

I fully appreciate the [ABLES] feelings. I have no question in my mind that the [ABLES] love the children, but I'm also convinced at the present time that the [ABLES] cannot cope with them. And if some decision cannot be made in six months to improve their homelife, perhaps Doctor [D___]has been able to crack the [ABLES] to the extent of improving them, to make them see their problems. It would be a help. If he has not, then the children are to be placed up for adoption in a suitable home.

Is Mr. [ABLE] presently employed, Mr. Kessler?

MR. [ABLE] Yes, I am, but I paint really --

THE COURT: Mr. Kessler, can you tell me?

MR. KESSLER: I don't know. I know he's working intermittently, that he has part-time jobs.

THE COURT: That's a problem.

MR. [ABLE] : I paint and work for --

THE COURT: All right. The Court's going to reserve decision, basically, in the case and wait for reports both from Doctor [D___] and the Division of Social Services in six months.

If another hearing is required, it will be held. If conditions have not improved, termination rights -- the parental rights will be terminated.

MR. KESSLER: Your Honor, if I may, since the Court has saw fit to retain jurisdiction in this case and since we're faced with the standardized operation policy of the Division of Social Services that limits visitation to one hour a month, I wonder if an order could not be drafted encouraging DSS at least to cooperate with the [ABLES] facilitating more frequent visitations?

THE COURT: I have no problem with that.

Do you have visitation now?

MR. KESSLER: No.

THE COURT: No visitation at all?

MR. KESSLER: Haven't had any since May of '76.

THE COURT: Well, I think Doctor [D___] should be a part of that decision as well. Something should be done in that light but, at the same time, if it's going to be upsetting to the child

MR. KESSLER: I understand.

THE COURT: -- the Court's going to frown upon it.

If you cannot work something out with the Division of Social Services, would you please let me know?

MR. KESSLER: Thank you, Your Honor.

THE COURT: Court will stand in recess.

APPENDIX C

SUPERIOR COURT
OF THE
STATE OF DELAWARE

VINCENT A. BIFFERATO
JUDGE

COURT HOUSE
WILMINGTON, DE. 19801

Submitted: May 3, 1978
Decided: May 31, 1978

Re: In the Matter of Four Minor Children
Civil Action No. 7165, 1976

Roger A. Akin, Esq.
Assistant Attorney General
State Department of Justice
State Office Building
820 French Street
Wilmington, Delaware 19801

Frederick S. Kessler, Esq.
Attorney for Respondents
Community Legal Aid Society, Inc.
103 West Seventh Street
Wilmington, Delaware 19801

Gentlemen:

In August, 1977, the Court heard testimony on the petition of the Division of Social Services of Delaware to terminate the parental rights of the father and mother over their four minor children. At the conclusion of the hearing, the Court ruled that at the time the children were placed in the care of the Division of Social Services the mother and father were unfit parents, and that their dependency was so great that, even in August, 1977, they should not have custody of the children. However, since they were being treated by a psychiatrist, the Court continued the case for six months to ascertain whether continued psychiatric treatment would be of benefit to the parents. A second hearing was held on April 28, 1978. At this hearing the Court heard testimony from two psychiatrists, Dr. Keeler and Dr. Davis. The testimony of each indicated clearly that the parents are still not ready to assume the role of parents to these four minor children. Their dependency needs are still so great that they cannot cope with the problems of raising four minor children, although Dr. Davis indicates that he believes, with time and further treatment, the parents could assume their parental duties. However, at this time the needs of the children are so great that their best interests must be considered first.

The children have been so damaged by the lack of parental care given them by the parents that there is a present and urgent need for a normal caring and loving home life so that they can develop into normal children and then adults. Long-term foster care is not an acceptable solution for the children. Therefore, their needs cannot wait until their parents are acceptable and able to fulfill their role as parents.

Based upon the testimony presented during the course of the hearings, the Court finds that the best interests of the children at the present time require termination of the parental rights of the father and mother.

IT IS SO ORDERED.

Very truly yours,

Vincent A. Biffanto

VAB:g

cc: Prothonotary
Law Library
Mr. Fred Kirch
File

APPENDIX D

Mandate

THE SUPREME COURT OF THE STATE OF DELAWARE

TO THE HONORABLE THE JUDGES OF

The Superior Court of the State of Delaware

in and for New Castle County:

Greeting:

WHEREAS, before you or some of you in a cause entitled as follows:

IN THE MATTER OF FOUR MINOR CHILDREN

C.A. No. 7165, 1976

a certain judgment or order was entered on the 20th day of June 1978, to which reference is hereby made; and

WHEREAS, by appropriate proceedings the said cause was duly appealed to this Court, and after hearing has been finally determined, as appears from the opinion of this Court filed in the cause decided January 7, 1980 on January 8 1980, a certified copy of which is attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the said judgment or order be and it is hereby affirmed.

WITNESS the Honorable D. L. Herrmann our Chief Justice, at Dover, the First day of January, A. D. 19 80

Issued January 29, 19 80

Clerk of the Supreme Court.

Supreme Ct. No. 205, 1978

COPY

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF DELAWARE

[ALBERT ABLE]
and [BETTY ABLE]

Respondents-Below,
Appellants,

vs.

DIVISION OF SOCIAL SERVICES,

Petitioner-Below,
Appellee.

No. 205, 1978

RECEIVED
APR 3 - 1980
DEPUTY CLERK
Georgetown

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that [ALBERT ABLE] and [BETTY ABLE], the Appellants in this Court, hereby appeal to the Supreme Court of the United States from the final judgment and mandate of this Court of January 29, 1980. Such judgment affirmed the judgment of the Superior Court, in and for New Castle County, terminating their parental rights in their four children.

The appeal is taken pursuant to 28 U.S.C. §1257(2).

Gary A. Myers

GARY A. MYERS, ESQUIRE
Attorney for Appellants
Staff Attorney
Community Legal Aid Society, Inc.
144 East Market Street
Georgetown, Delaware 19947

DATED: April 1, 1980

AFFIDAVIT OF SERVICE

UNDER SUPREME COURT RULE 33 (3) (c)

I, GARY A. MYERS, attorney in the office of Community Legal Aid Society, Inc., 144 East Market Street, Georgetown, Delaware and attorney of record for [ALBERT ABLE] and [BETTY ABLE], the Appellants herein, state under oath that on April 3, 1980, I served the attached Notice of Appeal on the Appellee, the Division of Social Services of the Delaware Department of Health and Social Services, by mailing three copies, in a duly addressed envelope, with first class postage prepaid, to its attorney of record as follows:

Thomas LaPenta, Esquire
Deputy Attorney General
Department of Justice
State of Delaware
State Office Building
820 North French Street
Wilmington, Delaware 19801

Gary A. Myers
GARY A. MYERS, ESQUIRE

SWORN TO AND SUBSCRIBED before me at Georgetown, Delaware, this 3rd day of April, 1980.

Brenda S. Short
Notary Public

FILED

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN THE MATTER OF:	*	7165, Civil Action 1976
[CANDY ABLE],	*	
[DOROTHY ABLE],	*	
[ELIZABETH ABLE],	*	
[FRED ABLE],	*	
	*	
Four Minor Children.	*	

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is given that [ALBERT ABLE] and [BETTY ABLE], the Respondents in this Court, hereby appeal to the Supreme Court of the United States from the final judgment and mandate of the Supreme Court of Delaware dated January 29, 1980 which affirmed this Court's order terminating their parental rights in their four children. The Supreme Court issued an opinion affirming this Court's order on January 7, 1980.

The appeal is taken pursuant to 28 U.S.C. §1257(2).

Gary A. Myers

GARY A. MYERS, ESQUIRE
Attorney for Respondents
Staff Attorney
Community Legal Aid Society, Inc.
144 East Market Street
Georgetown, Delaware 19947

DATE: April 1, 1980

PROTHONOTARY

APR 2 1 4 27 PM '80

FILED

AFFIDAVIT OF SERVICE

UNDER SUPREME COURT RULE 33 (3) (c)

I, GARY A. MYERS, attorney in the office of Community Legal Aid Society, Inc., 144 East Market Street, Georgetown, Delaware and attorney of record for [ALBERT ABLE] and [BETTY ABLE], the Appellants herein, state under oath that on April 3, 1980, I served the attached Notice of Appeal on the Appellee, the Division of Social Services of the Delaware Department of Health and Social Services, by mailing three copies, in a duly addressed envelope, with first class postage prepaid, to its attorney of record as follows:

Thomas LaPenta, Esquire
Deputy Attorney General
Department of Justice
State of Delaware
State Office Building
820 North French Street
Wilmington, Delaware 19801

Gary A. Myers
GARY A. MYERS, ESQUIRE

SWORN TO AND SUBSCRIBED before me at Georgetown, Delaware, this 3rd day of April, 1980.

Brenda S. Short
Notary Public

APPENDIX F

UNITED STATES CONSTITUTION, amendment XIV, section 1, clause 3:

"nor shall any state deprive any person of life, liberty, or property, without due process of law;"

13 DELAWARE CODE §§ 1101-1113:

§ 1101. Definitions.

As used in this chapter:

(1) "Abandoned" shall be interpreted as referring to any child who, for a period of 6 months, has not received any regular and reasonable financial help from his parent or parents or any person having parental rights or responsibility and on whose behalf no substantial contacts have been initiated by his parent or parents or any person having parental rights or responsibility during that period.

(2) "Authorized agency" means any agency licensed by the Department of Health and Social Services of this State to place children for adoption, or any agency duly approved, certified, recognized or licensed by the proper authority of any other state in which that agency is located to place children for adoption.

(3) "Child" means any male or female who has not attained his or her 18th birthday.

(4) "Mentally incompetent" shall be interpreted as referring to a parent who is unable to understand and discharge the natural and regular obligations of care and support of a child by reason of mental illness, psychopathology, mental retardation or mental deficiency.

(5) "Natural father" means the biological male parent of a child. (48 Del. Laws, c. 135, § 1; 13 Del. C. 1953, § 1101; 50 Del. Laws, c. 17, § 1; 53 Del. Laws, c. 102, §§ 1, 2; 57 Del. Laws, c. 363, § 8; 58 Del. Laws, c. 511, § 22; 59 Del. Laws, c. 466, §§ 14, 15; 61 Del. Laws, c. 178, § 2.)

§ 1102. Jurisdiction and venue.

(a) The Superior Court shall have jurisdiction of proceedings under this chapter to terminate parental rights.

(b) A petition for termination of parental rights may be filed in the Superior Court of any of the following counties:

(1) The county in which the petitioner resides;

(2) The county in which the organization having legal or physical care, custody or control of the child involved is located;

(3) The county in which the child involved is located.

(c) Whenever the Superior Court shall assume jurisdiction of a child for the purposes of this chapter, it shall be deemed to have retained jurisdiction for the purposes of proceeding under Chapter 9 of this title relating to adoption. (48 Del. Laws, c. 135, §§ 2, 5; 13 Del. C. 1953, § 1102; 50 Del. Laws, c. 17, § 1; 57 Del. Laws, c. 363, § 9; 57 Del. Laws, c. 402, § 2.)

§ 1103. Grounds for termination of parental rights.

The procedure for termination of parental rights for the purpose of adoption or, if a suitable adoption plan cannot be effected, for the purpose of providing for the care of the child by some other plan which may or may not contemplate the continued possibility of eventual adoption, may be initiated whenever it appears that:

(1) The parent or parents of any child, or the person or persons or organization holding parental rights over such child, desires to relinquish such parental rights; or

(2) Any child has been abandoned; or

(3) The parent or parents of any child or any person or persons holding parental rights over such a child are found by the Court to be mentally incompetent and, from evidence of 2 qualified psychiatrists selected by the Court, found to be unable to discharge parental responsibilities in the foreseeable future. The Court shall appoint a licensed attorney as guardian ad litem to represent the alleged incompetent in the proceeding; or

(4) The parent or parents of any such child, or any person or persons or organization holding parental rights over such child are not fitted to continue to exercise parental rights; or

(5) Both parents of a child are deceased.

Unless adoption is contemplated, the termination of 1 parent's parental rights by the other parent shall not be granted if the effect will be to leave only 1 parent holding parental rights, unless the Court shall find the continuation of the rights to be terminated will be harmful to the child. (48 Del. Laws, c. 135, § 2; 13 Del. C. 1953, § 1103; 50 Del. Laws, c. 17, § 1; 50 Del. Laws, c. 534, § 2; 53 Del. Laws, c. 102, § 3; 56 Del. Laws, c. 301, § 2; 59 Del. Laws, c. 466, § 16; 60 Del. Laws, c. 241, § 9.)

§ 1104. Persons eligible to petition for termination of parental rights.

A petition for the termination of parental rights may be filed by any of the following:

(1) The mother or the natural father, or both, of a child born out of wedlock;

(2) Both parents of a child born in wedlock if both parents are living;

(3) The surviving parent of a child born in wedlock, if 1 parent is dead;

(4) The mother or the natural father, or both, if the mother's legal husband at the time of the conception or birth of the child was not the natural father of the child. In the absence of evidence to the contrary, a notarized statement of the legal husband that he is not the father of the child shall be prima facie proof thereof;

(5) One parent alone if the other parent is incompetent by virtue of mental illness or mental retardation, or has abandoned the child, or is not fit to continue to exercise parental rights.

(6) A blood relative of a child whose parents are deceased or who are incompetent by virtue of mental illness or mental retardation, or who have abandoned the child, or who are not fitted to continue to exercise parental rights;

(7) An authorized agency or the State Department of Health and Social Services. (48 Del. Laws, c. 135, § 3; 13 Del. C. 1953, § 1104; 49 Del. Laws, c. 57, § 1; 50 Del. Laws, c. 17, § 1; 50 Del. Laws, c. 534, § 2; 59 Del. Laws, c. 466, § 17; 60 Del. Laws, c. 241, § 10.)

§ 1105. Contents of petition.

(a) The petition for the termination of parental rights shall state the:

(1) Name and place of residence of the petitioner or petitioners;

(2) Name, sex and date of birth of the child;

(3) Relationship of the petitioner or petitioners to the child or the fact that no such relationship exists;

(4) The names and addresses of the parents of the child if born in wedlock;

(5) If the child was born out of wedlock, the name and address of the mother and her marital status at the time of the child's conception and birth, and, in the event she was married at the time of the child's conception or birth, the name and address of the mother's husband at those times, and an affidavit by the mother setting forth either (i) the name and last known address of the natural father, or (ii) a statement that the mother knows the name of the natural father but is unwilling to disclose the name of the natural father, or (iii) a statement that the mother does not know the name of the natural father, or (iv) the name of the natural father, and a statement that the mother has never known his address;

(6) Name and last known address of the person or persons or organization holding parental rights and the name and address of the person or persons or organization having the care, control or custody of the child;

(7) Grounds for termination of parental rights;

(8) Name and address of the person or persons or of the authorized agency or officer thereof or the State Department of Health and Social Services or officer thereof for whom or for which parental rights are requested;

(9) In addition to other pertinent information, the petition shall, if the name and/or address of the natural father is not included, furnish detailed information concerning the efforts made to identify and locate the natural father so as to enable the Court to determine what further steps, if any, should be taken.

(b) Any consents required in § 1106 of this title shall accompany the petition as exhibits.

(c) In any case in which a petition for the termination of parental rights has been filed and an authorized agency or the State Department of Health and Social Services is a party to the proceedings, there shall be attached to the petition a social report. (48 Del. Laws, c. 135, § 4; 13 Del. C. 1953, § 1105; 50 Del. Laws, c. 17, § 1; 59 Del. Laws, c. 466, §§ 18, 19; 60 Del. Laws, c. 241, §§ 11, 12.)

§ 1106. Consent requirements; waiver of notice.

In the case of proceedings based on § 1103(1) of this title:

(1) A petition for the termination of parental rights shall be accompanied by the duly notarized consent in writing of the person or persons or organization holding parental rights;

(2) The consent provided for in subdivision (1) shall be required from:

a. Both parents of a child born out of wedlock; provided, however, that the consent of the alleged natural father need not contain an admission that he is the father. In the event that the named natural father disclaims paternity, an affidavit signed by him to that effect shall be attached to the petition in lieu of a consent from the natural father. It is further provided that in the event of a petition containing statements described in § 1105(a)(5)(ii), (iii) or (iv) of this title, after a hearing in which it is established on the record that the mother and father of the child are not living together as husband and wife openly and that they have not done so nor married since the birth of the child, the Court may, following consideration of the social report, dispense with the requirement of the father's consent in compliance with § 1113 of this title.

b. Both parents of a child born in wedlock except as provided in subparagraph c. if both parents are living, or from the survivor, if 1 is deceased, regardless of the marital status of the parents at the time the petition is presented;

c. The mother and the natural father, if the mother's legal husband at the time of the conception or birth of the child was not the natural father of the child. In the absence of evidence to the contrary, a notarized statement of the legal husband that he is not the father of the child shall be prima facie proof thereof. If such a notarized statement of the legal husband cannot be obtained, a notice of hearing shall be sent to him as provided in § 1107 of this title. The consent of the natural father is subject to paragraph a. above;

d. Any other person or persons or organization holding parental rights;

e. One parent alone if the other parent is incompetent by reason of mental illness or mental retardation, or has abandoned the child, or is not fitted to continue to exercise the parental rights.

(3) If the individual in whom the right to consent exists is under the age of 21 years, this fact shall not be a bar to the giving of consent nor render the consent when given invalid;

(4) Every petition shall be accompanied by a formal written consent executed by the person or persons or organization for whom or for which parental rights are requested;

(5) If the person or persons or organization holding parental rights wish to waive their right to any and all notice of hearing or right to appear at such hearing, the petition shall be accompanied by a notarized statement to this effect executed by the person or persons or organization holding parental rights. (48 Del. Laws, c. 135, § 6; 13 Del. C. 1953, § 1106; 50 Del. Laws, c. 17, § 1.)

(6) Consent by the natural father may be executed either before or after the actual birth of the child involved. (48 Del. Laws, c. 135, § 6; 13 Del. C. 1953, § 1106; 50 Del. Laws, c. 17, § 1; 59 Del. Laws, c. 466, §§ 20, 21; 61 Del. Laws, c. 178, § 3.)

§ 1107. Hearing procedure; notice of hearing; report.

(a) When a petition for the termination of parental rights is filed in which an authorized agency or the State Department of Health and Social Services is a party to the proceedings, the Court shall set a date for a hearing thereon, and shall cause notice of the time, place and purpose of the hearing to be served upon the parent or parents, person or persons or organization holding parental rights at his or their last known address; provided, however, no such notice shall be necessary if a waiver executed by the parent or parents, person or persons or organization holding parental rights has been filed with the petition, in accordance with the provisions of § 1106(5) of this title. The Court may require notice to be served upon any other person or organization.

(b) If the Court shall find that personal service within the State cannot be accomplished upon the parent or parents, person or persons or organization holding parental rights, the Court shall then cause notice of the time, place and purpose of the hearing to be published once a week, for 3 successive weeks, in such newspapers of the county, 1 or more, as the Court may judge best for giving the parent or parents, or person or persons or organization holding parental rights notice, the formal wording of said notice to be approved by the Court. Such publication shall constitute conclusive evidence of service and a hearing will then proceed at the time and date set with or without the appearance of the parent or parents, person or persons or organization so notified. Publication shall also be made in the locality in which the parent or parents, person or persons or organization holding parental rights is believed to be located if different from the county where the publication just described has been caused. If any publication is ordered pursuant to this subsection, the Court shall also order that the Prothonotary, at least 3 weeks prior to the hearing, shall send by regular and registered or certified mail to the parent or parents, or person or persons or organization holding parental rights, at the address or addresses given in the petition, a copy of the same notice, or a similar notice of the time, place and purpose of the hearing.

(c) Personal service at any time prior to the hearing shall be sufficient to give jurisdiction.

(d) When a petition for termination of parental rights is filed, and an authorized agency or the Department of Health and Social Services, Division of Social Services, is not a party to the proceedings, the Court shall, before any hearing, order a social study and report on the petition by an authorized agency or by the Department of Health and Social Services, to be filed within 4 months, subject to such additional time as the Court shall determine is reasonably required. The Court shall set a date for hearing to take place after the report is to be filed and notice shall be accomplished as outlined above. Any social report filed with the petition, or subsequently, as described above in this subsection, shall include the information specifically referred to in § 1105(c) of this title, where indicated.
(59 Del. Laws, c. 466, § 22; 60 Del. Laws, c. 241, § 13.)

(e) All hearings shall be held before the Court privately, but for reasons appearing sufficient to the Court the hearing in any particular case may be public. (48 Del. Laws, c. 135, § 6; 13 Del. C. 1953, § 1107; 50 Del. Laws, c. 17, § 1.)

§ 1108. Order of termination and transfer of parental rights.

(a) Should the Court find the termination of existing parental rights and their transfer to be in the best interests of the child, it shall make an order terminating such rights in the parent or parents, person or persons or organization in which they have existed and transferring them to some other person or persons or authorized agency or the State Department of Health and Social Services as may, in the opinion of the Court, be best qualified to receive them.

(b) If a child is abandoned by 1 parent only, the rights of such parent may be terminated without affecting the rights of the other.

(c) In the case of the termination of the parental rights of 1 parent only, for the purposes of adoption by a stepparent, upon the finding described in paragraph (a) of this section, the Court may, in its discretion, in lieu of a final order enter an interlocutory order which the Court shall make final at the completion of adoption proceedings, provided that any such interlocutory order which does not become final within 18 calendar months of the issuance thereof shall, upon the expiration of such 18 calendar month period, become null and void. (48 Del. Laws, c. 135, § 7; 13 Del. C. 1953, § 1108; 50 Del. Laws, c. 17, § 1; 56 Del. Laws, c. 300.)

§ 1109. Appeal.

The petitioner, if the petition is not granted; or any person or organization whose parental rights have been terminated by the order, may, at any time within 30 days after the making and entry of such decree, take an appeal therefrom to the Supreme Court. (48 Del. Laws, c. 135, § 8; 13 Del. C. 1953, § 1109; 50 Del. Laws, c. 17, § 1.)

§ 1110. Court costs.

All Court costs including costs of giving notice and advertising shall be paid by the petitioners. (13 Del. C. 1953, § 1110; 50 Del. Laws, c. 17, § 1.)

§ 1111. Confidential nature of records.

All records and dockets pertaining to any termination shall be confidential and shall be kept by the Prothonotary in a sealed container which shall be opened only by the order of a Judge of the Superior Court.

Anyone wishing to inspect any of the papers filed in connection with any termination shall petition a Judge of the Superior Court setting forth the reasons for the inspection. The Judge may refer the petition to the State Department of Health and Social Services or to an authorized agency for investigation and report. If, in the opinion of the Court, the information is necessary, and the interests of the child, the natural parents or the adoptive parents will not be prejudiced by its disclosure, the Court shall issue an order permitting the release of the information and setting forth the terms under which it shall be released. (13 Del. C. 1953, § 1111; 50 Del. Laws, c. 17, § 1; 57 Del. Laws, c. 402, § 2.)

§ 1112. Effect of termination of parental rights.

Upon the issuance of an order terminating the existing parental rights and transferring such parental rights to another person or organization, the effect of such order shall be that all of the rights, duties, privileges and obligations recognized by law between the person or persons whose parental rights are terminated and the child shall forever thereafter cease to exist as fully and to all intents and purposes as if the child and the person or persons whose parental rights have been terminated were and always had been strangers. The person or organization to whom said parental rights are transferred shall have custody and guardianship of the child but such custody and guardianship shall terminate automatically upon the entry of another order transferring parental rights or on an order of adoption. (13 Del. C. 1953, § 1112; 53 Del. Laws, c. 102, § 4.)

§ 1113. Interpretation.

This chapter is designed to achieve without undue delay the paramount objective of the best interest of the child, and all questions of interpretation shall be resolved with that objective in mind. (59 Del. Laws, c. 466, § 23.)

Supreme Court, U.S.
FILED
MAY 7 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-6370.

ALBERT ABLE and BETTY ABLE,

Appellants,

v.

THE STATE OF DELAWARE,

Appellee.

On Appeal From the Supreme Court of the State of Delaware.

MOTION TO DISMISS OR AFFIRM.

REGINA MULLEN SMALL,
State Solicitor,
JOHN A. PARKINS, JR.,
Assistant State Solicitor,
ROGER A. AKIN,
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May 1980

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IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-6370.

ALBERT ABLE and BETTY ABLE,
Appellants,

v.

THE STATE OF DELAWARE,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE.

MOTION TO DISMISS OR AFFIRM.

The Appellee respectfully moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Delaware on the ground that it is manifest that the question on which the decision of the cause depends is so insubstantial as not to require further argument.

STATEMENT OF THE CASE.

Appellants Albert Able and Betty Able are the biological parents of the four children, known here as Candy, Dorothy, Elizabeth and Fred, who are the focus of this appeal. Appellee Division of Social Services of the Delaware Department of Health and Social Services ("the Division") is statutorily required to seek out minors in need of protection and care within the State. 31 *Del. C.* ch. 3.

Betty Able was born on April 5, 1953. Albert was born four years earlier.[1] Candy was born on April 24, 1969, when her mother was just sixteen years old. Dorothy was born on April 21, 1971.[2] Appellants voluntarily surrendered custody of Candy and Dorothy to Division in April, 1972. Albert was unemployed and the two parents were unable to cope with parenting.[3] Betty suggested that Candy and Dorothy be placed in Division foster care for six months to a year.[4] Betty testified that the placement was made to allow Betty and Albert to "work out problems."[5] Candy and Dorothy were returned to Betty and Albert in June, 1972.[6]

Subsequent to the return of Candy and Dorothy, Elizabeth was born on January 24, 1973. During this

1. 1 Tr. 113. The trial in this matter occurred over a period of three days. Each day's proceedings is recorded in a separate transcript. References in Appellee's Motion to Dismiss or Affirm to the August 22, 1977, hearing shall be denoted "1 Tr.", references to the August 23, 1977, hearing shall be denoted "2 Tr.", and references to the April 25, 1978, continued hearing shall be denoted "3 Tr.".

2. Appellant's Answer Brief in Delaware Supreme Court Below at ii.

3. 1 Tr. 190.

4. 1 Tr. 191.

5. *Id.*

6. 1 Tr. 101.

period, as during prior and subsequent stages, it was the goal of Division to keep the Able family together [7] and to provide supportive social services.[8] A representative of Division maintained almost daily contact with Betty and Albert.[9]

During the Summer of 1973, Division briefly held legal custody of Candy, Dorothy and Elizabeth.[10] This custodial relationship was apparently the result of Betty's hospitalization among other factors.

Between August, 1973 and March, 1974, the Division's direct observations and communications from the parents and the children caused it serious concern. Candy expressed a desire to leave the Able home and return to a foster mother.[11] Betty apparently did not object.[12] Candy, then age four, was sleep-walking and strewing food at random around the Able home.[13] Dorothy exhibited a fear of male figures.[14] The Able house was unkempt.[15] Betty and Albert fought verbally and physically.[16] Albert on one occasion forced himself sexually on Betty.[17] Albert exhibited a sporadic employment pattern.[18]

In early 1974, Betty informed the Division that she was again unable to cope with the three children. She

7. 1 Tr. 8, 21.
8. 1 Tr. 13.
9. 1 Tr. 9.
10. 1 Tr. 101-103.
11. 1 Tr. 22.
12. *Id.*
13. 1 Tr. 11, 24.
14. 1 Tr. 11.
15. 1 Tr. 13.
16. 1 Tr. 15.
17. 1 Tr. 16.
18. 1 Tr. 17-18.

requested that they be placed in foster care immediately.[19] Betty and Albert executed consent papers to such placement soon thereafter.[20] Betty stated that an extensive period would be needed in which to resolve domestic problems. The Division was asked to keep the children in foster care for at least a year *even if* she requested their return in a shorter period.[21] The children were subsequently placed in foster care in March, 1974.

Subsequent to March, 1974, the Division's goal in the Able matter remained the reunification of the family.[22] This in spite of the fact that Betty and Albert had become separated.[23] The Division's plan was to observe enough progress in the Able home that the three children could begin to return in the Summer of 1975.[24]

During the Winter of 1974-1975, Albert experienced several changes in employment.[25] Fred was born on January 4, 1975. In April, 1975, the electricity to the Able home was shut off due to nonpayment of bills.[26] The Division interceded with the local power company and electric service was resumed.[27]

After a brief period of stability in the husband-wife relationship, arguments began again. Betty attempted to evict Albert from the home as a result of the arguments and Albert's drinking.[28] Over the objections of the Divi-

19. 1 Tr. 26.
20. 1 Tr. 27.
21. *Id.*
22. 1 Tr. 51.
23. *Id.*
24. 1 Tr. 66, 67.
25. *Id.*
26. 1 Tr. 68.
27. 1 Tr. 69.
28. 1 Tr. 72, 73.

sion, Candy's custody was returned to the Ables in September, 1975.[29] The Division's opposition stemmed from the continued fighting, Albert's unemployment, and Betty's allegations to the Division that Albert was involved with another woman.[30]

The Division's concerns were well-founded. Candy's sleep-walking and food-throwing episodes were again manifested.[31] Betty continued her heavy dependence on Division employees for advice in basic parenting skills.[32]

In November, 1975, Dorothy and Elizabeth were returned to the Ables pursuant to court order.[33] The burden of having to care for their four children simultaneously proved overwhelming to Betty and Albert. Within one week of the return of Dorothy and Elizabeth, Betty informed the Division that the Able home was deteriorating.[34] Betty experienced severe depression.[35] Candy and Elizabeth continued to sleep-walk and destroy food.[36] All three girls, then ages 6, 4, and 2 respectively, exhibited bed-wetting behavior.[37] Albert recommended Elizabeth's removal from the home.[38] Candy missed 46 days of school during the 1975-76 school year.[39] The electricity to the Able home was again turned off.[40] Betty

29. 1 Tr. 76.
30. *Id.*
31. 1 Tr. 79.
32. 1 Tr. 78.
33. 1 Tr. 80.
34. 1 Tr. 81.
35. *Id.*
36. 1 Tr. 82.
37. 1 Tr. 88, 89.
38. 1 Tr. 83.
39. 1 Tr. 169.
40. *Id.*

overdosed on drugs and was hospitalized in March or April, 1976.[41]

During this tumultuous period, Division representatives strongly urged the Ables to seek assistance from Delaware Guidance for Children and Youth, Headstart Day Care and a Public Health Department milk program.[42] Other services which were urged on the Ables included Public Health Service nurses and the services of a State Mental Hygiene clinic.[43]

In May, 1976, the Family Court awarded permanent custody of all four Able children to Division.[44] Concurrently, the Division made the decision that the termination of the Ables' parental rights in the children would lie in the best interests of the children. Among other things, the termination decision was based on the lack of improvement in the family situation over a five year period, the poor husband-wife relationship, Albert's lack of steady employment, and the deterioration in the home which was triggered every time the children were returned.[45] It was also felt that neither parent was capable of functioning as a "full parent" and the children were suffering as a result.[46] The future of the children became paramount in the collective eyes of the Division.[47]

Immediately after the four Able children were placed in foster care, improvement in their growth was observed. Fred was unable to chew food and walk at 16 months.[48]

41. 1 Tr. 92.
42. 1 Tr. 84, 85.
43. 1 Tr. 122.
44. 1 Tr. 93.
45. 1 Tr. 94, 95.
46. 1 Tr. 119.
47. 1 Tr. 120, 138.
48. 1 Tr. 165.

Shortly after his placement, he was walking and eating with a fork and spoon.[49] Candy's bed-wetting, which occurred during visits and placements in the Able home in the past, had subsided by November, 1976. She verbalized desires not to return to the Able home.[50]

From March, 1976 until the time of the hearing on the Division's termination petition, Betty and Albert Able were seen weekly by Dr. V. Terrell Davis, Director of Psychiatry at the Wilmington (Del.) Medical Center.[51] Davis testified at the initial termination hearing in August, 1977, that his first contact with Betty resulted from her hospitalization for drug overdose in March, 1976.[52] Davis testified that Betty's psychological problems were in part due to her inability to care for her children.[53] He stated that the removal of the children from the Ables helped the Ables and their children at the same time.[54]

Davis conceded that during his treatment of the Ables, they showed "extremely poor judgment" in dealing with personal problems.[55] Despite the fact that he never saw the Ables interact with their children,[56] he further testified that perhaps the Ables could one day manage parental responsibilities.[57]

At the continued hearing on the Division's petition in April, 1978, Dr. Davis testified that Albert and Betty's dependency continued.[58] He guessed that perhaps in two to five years the Ables may be ready to care for the Able

49. 1 Tr. 167.
50. 1 Tr. 176.
51. 2 Tr. 5-7.
52. 2 Tr. 6.
53. 2 Tr. 10.
54. 2 Tr. 8.
55. 2 Tr. 11.
56. 2 Tr. 13.
57. 2 Tr. 15.
58. 2 Tr. 116.

children.[59] Nor did Betty Able have an idea as to how long it would take to resolve persistent problems.[60] He conceded, however, that regression was a possibility[61] and that instability in the home persisted even in the absence of the children.[62]

Dr. Priscilla A. Keeler, a private practitioner in child psychiatry, was called by the Division to testify at the April, 1978, hearing. She saw the Able children together and separately in November, 1977, and in April, 1978.[63] She also saw the Ables together in April, 1978.[64] She testified that the multitude of moves of the Able children was "extraordinarily damaging."[65] She testified that each of the Able children is vulnerable to stress and strain[66] and that each will bear the scars of his childhood experiences forever.[67]

Dr. Keeler articulated specific injuries which the Ables' chronic neglect had caused. Candy's enforced isolation from the surrounding community slowed her development.[68] Through their own dependency, the Ables forced Candy to assume parental roles at the age of seven years.[69] Keeler testified that in all her years of practicing child psychiatry, she had never seen a child as terrified as Dorothy.[70] She exhibited enuresis of likely emotional

59. 3 Tr. 119.
60. 3 Tr. 184.
61. 3 Tr. 129.
62. 3 Tr. 152.
63. 3 Tr. 10.
64. 3 Tr. 40.
65. 3 Tr. 12.
66. 3 Tr. 18.
67. 3 Tr. 67.
68. 3 Tr. 17.
69. 3 Tr. 25.
70. 3 Tr. 19.

origin.[71] Elizabeth manifested isolation.[72] Fred initially showed below-level performance in almost all levels of functioning[73] as a "failure to thrive" child.[74] She attributed his slowness to emotional and physical neglect.[75]

Dr. Keeler articulated Betty's continuing "tremendously strong dependency needs."[76] She flatly stated that she did not think they could ever be made to be adequate parents.[77] She concluded that the Able children have been deprived of their right to a normal, loving, nourishing home life which will facilitate their development into secure and happy adults.[78] The deprivation has resulted in permanent psychological scarring.[79]

Based on the testimony above, the Superior Court held that Albert and Betty Able were not capable of acting in the role of parents to their four children.[80] The children were found to have been "so damaged" by Betty's and Albert's dependency needs that there is a "present and urgent need for a normal caring and loving home life so that they can develop into normal children and then adults." The Court specifically rejected the specter of indefinitely long-term foster care.[81]

On behalf of Candy, Dorothy, Elizabeth and Fred, appellee respectfully requests that this Court give finality to the judgment below and thereby permit the permanent adoptive placement of these children who have suffered so much from the neglect of the Ables.

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71. 3 Tr. 32.
72. 3 Tr. 36.
73. 3 Tr. 20.
74. 3 Tr. 21.
75. 3 Tr. 37, 38.
76. 3 Tr. 41, 43, 74, 76.
77. 3 Tr. 73.
78. 3 Tr. 49.
79. 3 Tr. 67.
80. Appellants' Jurisdictional Statement, Appendix C.
81. *Id.*

THE QUESTION IS INSUBSTANTIAL.

The Delaware TPR Statute Is Not Unconstitutionally Vague and Indefinite.

It is axiomatic that a state must tread carefully when it seeks to alter the integrity of the family.[82] Nonetheless, it is also well established that neglectful parents may be separated from their children. *Stanley v. Illinois,* 405 U. S. 645, 652 (1972). Here, substantial evidence has established that the interest of the parents in retaining parental rights is inimical to the "best interests" of these children. Proof of both parental unfitness and the fact that termination lies in the best interests of the Able children clearly satisfies the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

In *Quilloin v. Walcott,* 434 U. S. 246, 255 (1978), this Court cited an earlier concurrence by Mr. Justice Stewart which set forth the following dual proof requirement in cases such as this one:

> We have little doubt that the Due Process Clauses would be offended "(if) a State were to attempt to

82. Appellants cite the Court to a series of cases which restrict state intrusion into family life. However, none of them reflects the central familial issue in a TPR proceeding, the inherent conflict between the interests of the parents and the children. Compare *Quilloin v. Walcott,* 434 U. S. 246 (1978) (statute declares unwed fathers unfit as matter of law); *Prince v. Massachusetts,* 321 U. S. 158 (1944) (statute prohibits minor's sale of religious literature); *Cleveland Board of Education v. LaFleur,* 414 U. S. 632 (1974) (school regulations require early termination of pregnant teachers); *Moore v. East Cleveland,* 431 U. S. 494 (1977) (ordinance prohibits extended families in single family dwellings); *Wisconsin v. Yoder,* 406 U. S. 205 (1972) (mandatory school attendance laws conflict with religious principles); *Pierce v. Society of Sisters,* 268 U. S. 510 (1925) (school attendance laws preclude parochial school attendance); *Meyer v. Nebraska,* 262 U. S. 390 (1923) (state law prohibits teachings in German language).

> force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Smith v. Organization of Foster Families*, 431 U. S. 816, 862-863, 53 L. Ed. 2d 14, 97 S. Ct. 2094 (1977).

The dual fitness/best interests test had become a settled principle of Delaware TPR law long before Smith.[83]

The Delaware Supreme Court has been careful to explicate these terms so that they are comprehensible by parents and their application by the trial court cannot be arbitrary. In doing so, the Delaware Supreme Court has ensured that the evils in the statute of which appellants complain: failure to give adequate warning of proscribed conduct and standardless and discriminatory application, cannot occur. Assuming *arguendo* that the statutory language is unconstitutionally vague on its face, that imprecision may be cured by narrowing court interpretations. *Lake Carriers' Assn. v. MacMullan*, 406 U. S. 498 (1972).

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83. Parental unfitness has been statutory ground for protecting children since 1907. *In re Three Minor Children*, 406 A. 2d 14, 16 (Del. 1979). Both unfitness and the best interests must be shown in a TPR. *Cline v. Hartzler*, 227 A. 2d 210 (Del. 1967). The best interest factor in TPR's is presently codified at 13 *Del. C.* § 1113. The best interest test has been applied consistently by Delaware courts when dealing with issues affecting the custody and control of children. *See e.g. Smith v. Smith*, 45 A. 2d 879 (Del. Super. 1946) (custody; good of child is "primary or leading consideration"); *In re Fusco*, 127 A. 2d 468 (Del. Orph. 1956) (TPR; "best welfare of the child is the paramount concern"); *In re Two Minor Children*, 231 A. 2d 475 (Del. 1967) (visitation; best interest of children is "primary consideration"); *In re E.*, 239 A. 2d 626 (Del. 1968) (TPR; best interests of child is "prime and overriding concern."). *In re One Minor Child*, 295 A. 2d 727 (Del. 1972) (visitation; best interests of child supercedes "desires of parents").

The Delaware Supreme Court has held that the common, ordinary dictionary meaning of the statutory phrase "not fitted" should be used in applying the TPR statute. ". . . [A]s to matters pertaining to custody of children, [the words 'not fitted'] are to be read generally as meaning 'unfitted for parental duties'." *In re Dingee,* 328 A. 2d 139, 140 (Del. 1974). Furthermore, the Delaware Supreme Court twice has cited with approval the following standards adopted in *Clark v. Lyon,* 82 Neb. 625, 633, 118 N. W. 472, 475 (1908): a) concern the parent has shown in the past for the children; b) the suitability of the parents' domestic surroundings to receive the children; and c) the children's general welfare. *In re Dingee, supra; In the Matter of Three Minor Children,* 406 A. 2d 14, 17 (Del. 1979). Additionally, the Delaware Supreme Court has held that:

> Unfitness cannot be based on poverty and lifestyle which do not reflect a lack of concern for and ability to care for the children or an unwillingness to receive the children as part of a family. *In the Matter of Five Minor Children,* 407 A. 2d 198, 200 (Del. 1979).

Indeed, the Second Circuit has recognized in *Duchesne v. Sugarman,* 566 F. 2d 817 (2d Cir. 1977), cited by Appellants, that termination proceedings are "fact specific" in nature. The Appellants miss the mark when they attack the Delaware courts for arbitrariness because they require each case to be decided on its own facts. What the Delaware courts have done is to ensure that the principles enunciated by the Delaware Supreme Court are fully considered on the specific facts of each case brought before them.

Nor is the "best interest" standard impermissibly imprecise. In fact, the Delaware Supreme Court has sug-

gested that the relevant factors in a custody proceeding provide a good basis for assessing the "best interest" of a child in a TPR setting. *In the Matter of Three Minor Children, supra* at 19. These relevant factors include: the interaction and interrelation of the child with his parents, his siblings and others who may significantly affect his interests; the child's adjustment to his home, school, and community; and, the mental and physical health of the individuals involved. See 13 *Del. C.* § 772(a). The application of those factors here confirms the result of the trial court.

The Appellants miscite this Court's holding in *Smith v. Goguen,* 415 U. S. 605 (1974) in claiming that it stands for the proposition that state regulation of the parent-child relationship must satisfy "a greater degree of specificity than in other contexts." *Smith v. Goguen, supra* at 573, J. S. 8. *Smith* is a flag desecration case, not a TPR or custody case. The quotation in Appellants' Jurisdictional Statement refers to an attempt to regulate speech protect by the First Amendment.

The conflict which appellants would create in the decisions of the courts which have considered TPR statutes under attack for vagueness does not commend itself to this Court's attention. *Alsager v. District Court,* 406 F. Supp. 10 (S. D. Iowa 1975) *aff'd. on other ground,* 545 F. 2d 1137 (8th Cir. 1976) is a judicial aberration.[84] Misapplying a strict vagueness test analogous to that employed in analyzing criminal statutes or those which chill protected First Amendment speech, the *Alsager* court overlooked or ignored the significance of the child's right to be free from an empty if not damaging "family" situation.

84. Only *Roe v. Conn,* 417 F. Supp. 769 (M. D. Ala. 1976) and *Davis v. Smith,* — Ark. —, 583 S. W. 2d 37 (1979) purport to follow Alsager.

For the state, or a legal guardian,[85] institutes a TPR proceeding not for its own benefit but for that of the child. To require a strict vagueness analysis is to condemn children who are neither abandoned nor seriously physically abused to suffer from an ideal called family integrity when the very dynamics of that concept do not lend themselves to precise definition.

Alsager stands appropriately alone in its analysis. The vast majority of state courts have refused to follow its teachings.

In *Matter of Keyes,* 574 P. 2d 1026 (Okla. 1978), the Supreme Court of Oklahoma upheld a statute which permitted termination if a parent

> [F]ailed to give the child parental care or protection necessary for his physical or mental health. 10 O. S. 1971, § 1130 A.(3)(a).

The Court was "not persuaded by the *Alsager* case . . . nor the reasoning of *Roe v. Conn. . . .*" *Id.* at 1029. Similarly, the Texas Court of Civil Appeals in *Sanchez v. Texas Department of Human Resources,* 581 S. W. 2d 260 (Tex. 1979) specifically refused to follow *Alsager* in reviewing a TPR appeal.

Other state courts have rejected vagueness attacks on statutes because their respective TPR laws provide basic standards which the "average intelligent person can understand" [86] or which can be "commonly grasped." [87] Some state courts which rejected vagueness challenges prior to Alsager were not swayed by the same rationale.[88]

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85. 13 *Del. C.* § 1104.

86. *Matter of D. T.,* 89 S. D. 590, 596, 237 N. W. 2d 166, 169 (1975); *In re William L.,* 477 Pa. 322, 383 A. 2d 1228, cert. denied 439 U. S. 880 (1978).

87. *In re Metteer,* 203 Neb. 515, 279 N. W. 2d 374 (1979).

88. *E.g., In re Cager,* 251 Md. 473, 248 A. 2d 384 (1968); *State v. McMaster,* 259 Ore. 291, 486 P. 2d 567 (1971).

The Court should dismiss this appeal because of the clear lack of a substantial constitutional question. The almost universal refusal to follow *Alsager* is recognition that

> . . . [U]nlike criminal statutes in which the interests of only one set of individuals is involved, the constitutional issue must be examined with the interests of both the child and the parents. What might be unconstitutional if only the parents' rights were involved is constitutional if the statute adopts legitimate and necessary means to protect the child's interests. *State v. McMaster*, 259 Ore. 291, —, 486 P. 2d 567, 569 (1971).

CONCLUSION.

Appellee respectfully requests the Court to dismiss or affirm the appeal or in the alternative to consolidate this case for argument with *Doe and Roe v. The State of Delaware*, No. 79-5932.

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